No. 7297

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK (a corporation),
Appellant,

vs.

HERBERT E. FREY,
Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

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STATEMENT OF THE CASE.

By this action plaintiff, both as beneficiary and assignee of the beneficiaries, sought to recover upon five policies of life insurance totaling $40,000.00. The case was tried to a jury and resulted in a verdict for defendant on three of the policies, totaling $20,000.00, and a verdict for plaintiff on two of the policies, totaling $20,000.00. It is from the latter verdict and judgment thereon that defendant appeals. No appeal was taken by plaintiff.

On March 4, 1933, Walter E. Frey made written application (Tr. pp. 63, 64) to defendant for three policies of insurance upon his life, as follows:

$35,000.00 payable to San Francisco Milling Company;

$10,000.00 payable to Herbert E. Frey, his brother;

$10,000.00 payable to Selma Steventon, his sister.

Defendant refused to issue the policy for $35,000.00, payable to San Francisco Milling Company, but issued and sent to its San Francisco agency two policies for $10,000.00 each, payable to Herbert E. Frey and Selma Steventon. Meanwhile, however, having learned that Walter E. Frey contemplated aviation in a private plane, these two policies were recalled; but upon receiving a declaration by Walter E. Frey that he would not fly in a private plane, the policies were again sent to the local agency. They carried the "airplane clause,"—prohibiting flights in private planes. The policies were accompanied by a "slip" (Exhibit "J", Tr. p. 76) which was required to be signed before the policies could be delivered. Upon their arrival they were delivered by the agency cashier, Mr. Murray, to the soliciting agent, Steinfeld, and the latter gave to Mr. Murray, as cashier, his personal checks for the net premium; that is to say, the premium less his commission. He then went to the office of the San Francisco Milling Company, and in the absence of Walter E. Frey, but in the presence of Selma Steventon and Herbert E. Frey, the beneficiaries, handed the policies to Selma Steventon with the words: "Here are the policies, they are paid for." (Steventon, Tr. p. 38.)

Defendant having rejected the policy for $35,000.00, payable to San Francisco Milling Company, it was the

idea that the two policies should be assigned to the San Francisco Milling Company (it was apparently so-called "corporate insurance" which was wanted), and a form of assignment was actually executed by some of the parties, but never completed. Mr. Steinfeld testified that "Mrs. Steventon thereupon said, 'We don't want these policies. Walter might be feeling good some night and he will jump into a plane of a friend and fly on to Chicago and get killed.' They said further, 'It is impossible to comply with the requirements of these assignments. We could not in a thousand years get Walter's wife to sign these papers.' " (Tr. p. 66.)

Mr. Steinfeld then tried to collect the premium, but failed, *and no part of the premium was ever paid.* Two or three days later, failing to collect the premium Mr. Steinfeld stopped payment on the checks. These checks with the stop-payment notice are in evidence.

Mr. Steinfeld made further and continued efforts to collect the premium and finally, so he testified, called Mrs. Steventon on the telephone and asked her either to return the policies or pay the premium, as the company's auditor would be in and he must have either the premium or the policies. Thereupon Mrs. Steventon did return the policies to Mr. Steinfeld, who returned them to Mr. Murray, the cashier, who in turn returned them to the home office in New York, where they were cancelled.

It is important to note that no demand was ever made by Walter E. Frey or the beneficiaries for the return of these policies; they remain cancelled and

office copies only were produced at the trial. (Tr. p. 36.)

Some time later (after the surrender of the policies), so Mr. Steinfeld testifies (Steinfeld, Tr. p. 68), "Herbert rang me up and said, 'Now, I know what we want to do, we know just what we want to do now, and how much we want to take.' He told me how the policies should be made out and what they wanted to do. I said, 'Fine, Herb, your instructions will be carried out, but we must have Walter call at our office and furnish us with another examination.' He wanted $5000.00 for Jack Steventon, a nephew, $5000.00 for Herbert, and $10,000.00 for San Francisco Milling Company." In consequence of this conversation Walter E. Frey did have a second physical examination and furnished a certificate of good health (Defendant's Exhibit A, Tr. p. 55.) This was dated June 1, 1932. Pursuant thereto three policies were again sent to the San Francisco agency, arriving on June 4, 1932. Steinfeld testified (Tr. p. 70), "I immediately got on the telephone and talked to Herbert. I told him that the policies had arrived. He said, 'I will met you in an hour in the Merchants Exchange.' I said, 'Fine, where will I meet you—will I meet you in the grain pit?' He said, 'No, I will meet you up in room' so and so. I could not quite grasp that. Anyway I met him there in the office of Carl R. Schulz, an attorney. I met Steventon. He came along with me. When we got there I said, 'Here are your policies, boys.' We were talking there for about five or ten minutes and I said, 'Is Walter dead?' They said, 'Yes, he died last night.' "

As a matter of fact, Walter E. Frey had died in bed the preceding night, from, as testified by Doctor Berger, autopsy surgeon to the coroner, acute dilation of the heart, chronic myocarditis, and coronary sclerosis with occlusions. Based upon his autopsy, the examination made, his experience in thousands of autopsies and his medical training, Doctor Berger expressed the opinion that Walter E. Frey was not in good health on or subsequent to March 4, 1932.

Liability being denied upon any of the policies by defendant, this action was brought which, as stated, resulted in a verdict for defendant as to the latter three policies, and in favor of plaintiff as to the former two policies. Hence this appeal.

The application signed by Walter E. Frey on March 4, 1932, and the only application, contains the following stipulations:

> "This application is made to The Mutual Life Insurance Company of New York herein called the Company. All the following statements and answers, and all those that the insured makes to the company's medical examiner, in continuation of this application, are true, and are offered to the company as an inducement to issue the proposed policy. The insured expressly waives on behalf of himself or herself and of any person who shall have or claim any interest in any policy issued hereunder, all provisions of law forbidding any physician or other person who has attended or examined, or who may hereafter attend or examine the insured, from disclosing any knowledge or information which he thereby acquired. The proposed policy shall not take effect unless and

until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health and unless and until the first premium shall have been paid during the insured's continuance in good health."

And, further:

"It is agreed that no agent or other person except the President, Vice-President, a Second Vice-President, or a Secretary of the company has power on behalf of the company to bind the company by making any promise respecting benefits under any policy issued hereunder or accepting any representations or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the company's rights or requirements."

QUESTIONS IN ISSUE.

Out of the foregoing facts the following questions emerge:

1. The stipulation in the application that the premium must be paid in advance makes payment thereof a condition precedent to the taking effect of the policies; that is, the policy will not take effect until the first premium is paid. The application contains the further stipulation that no agent other than certain specified officers can waive this requirement. Since no premium is paid, and there was no waiver thereof, as required by the application, the policies

never took effect. This question is raised by the first, third and fifth assignments of error. (Tr. pp. 124, 126 and 130.)

2. There was no meeting of the minds of the parties sufficient to constitute a contract. There was no delivery or acceptance of the policies in fact. Acceptance and delivery are a question of intent, and the facts established no intent to deliver and accept the policies so as to make them effective. This question is raised by the first, second, third and fifth assignments of error (Tr. pp. 124, 125 and 130), and the objections to certain instructions covered by the seventh assignment of error. (Tr. p. 134.)

3. The stipulation in the application that the premium must be paid while the applicant is in good health makes not only payment but good health a condition precedent to the taking effect of the policy. We believe the evidence establishes that applicant, Walter E. Frey, was not in good health. This question is raised by the fourth and fifth assignments of error. (Tr. pp. 129 and 130.)

ERRORS RELIED UPON.

The following are the assignments of error which will be relied upon:

I.

The court erred in admitting evidence on behalf of the plaintiff as follows:

Plaintiff offered in evidence policy No. 4,615,421, policy No. 4,600,870 and policy No. 4,615,420.

Mr. Boland. I object to the offer and introduction in evidence upon the grounds, first, that it does not appear that the policies are in conformity with the application which is printed therein. Second: There is no showing that the premium thereon was paid. Third: It does not appear that any of the policies were delivered. Fourth: Upon the ground that the premium thereon was not paid while the insured was in good health, and that the burden of proof is upon the plaintiff to establish that delivery occurred while the applicant was in good health. Fifth: That the premium was not paid while the applicant was in good health.

The objection was overruled and exception allowed, and the policies introduced in evidence, and copies of each were annexed to and are a part of the complaint herein.

II.

The court erred in admitting evidence on behalf of the plaintiff as follows:

Plaintiff thereupon offered in evidence copies of policies numbers 4,591,472 and 4,591,-473, following stipulation of counsel that they were copies of policies dated March 8, 1932, and were furnished by defendant to plaintiff pursuant to an order of this court, that the originals had been destroyed, that the copies of the applications annexed thereto were annexed in error and that the true applications were the same as annexed to the other policies exhibits 1 and 2; that the marks "cancelled" appearing upon the signatures were not upon the originals at the time the policies were in the hands of

plaintiff, and that the beneficiary as shown on the original of exhibit 3 was Thelma Frey.

The Court (referring to exhibits 3 and 4). We will consider them as copies of the originals.

Mr. Boland. As to these, I will make the same objection, if I may do it in that manner, without repeating the grounds of objection.

The Court. Yes, you may, of course.

Mr. Boland. And I add to the objection that these are copies and the original is not accounted for, and there can be no assumption of delivery by the mere fact of possession, and therefore there is no foundation laid for their introduction; also, upon the further ground, as it appears in the policies themselves, the application was for $35,000.00, payable to the San Francisco Milling Company, which is not involved here, and the two $10,000.00 policies, and not for five policies, and that, therefore, either these policies are not admissible or the plaintiff must be put to his election as to which $20,000.00 he will rely upon.

The objection was overruled; exception allowed; policies introduced in evidence and marked "Plaintiff's Exhibit 3" and "Plaintiff's Exhibit 4."

III.

The court erred in denying the following motion: At the termination of plaintiff's case, defendant's attorney made the following motion:

Mr. Boland. I will now make a motion for dismissal of the case upon the ground that it has not been made to appear by any evidence that there was a delivery of any policy with intent to consummate a contract of insurance.

I am referring to all of the policies, instead of naming each one, if I may do it that way, your Honor. There is no evidence that there was any delivery of any of the policies with intent to consummate a contract of insurance. There is no evidence of the acceptance of any of the policies by Walter E. Frey, or by anyone on his behalf, with intent to consummate a contract of insurance. There is no evidence that any premium was paid upon any policy. That no policy was delivered to Walter E. Frey, or to anyone on his behalf, or accepted by him or anyone on his behalf. No policy was delivered to Walter E. Frey or to anyone on his behalf while he was in good health. No policy was accepted by Walter E. Frey or anyone on his behalf while he was in good health. No premium upon any policy was paid by said Walter E. Frey or anyone in his behalf while he was in good health. No policy was delivered to Walter E. Frey or to anyone on his behalf, or accepted by him or by anyone on his behalf, or the premium thereon paid, while Walter E. Frey was in good health.

After argument of the motion, plaintiff asked permission, which was granted, to reopen the case.

Herbert W. Allen,

being called as a witness for plaintiff, being first duly sworn, testified as follows:

I am a duly licensed physician, practicing in San Francisco over thirty years, and am a graduate of Johns Hopkins Medical School. I am in the employ of defendant, and have been for something over twenty years. I have a per-

sonal recollection of making a physical examination of Walter E. Frey about the 4th day of March, 1932. It was the usual insurance examination. The first thing we do is to obtain the applicant's medical history, family history, moral history, etc. Then we make a physical examination which includes the applicant's height, weight, measurements, heart and lungs, a review of his nervous system and an abdominal examination. I made such an examination on or about March 4, 1932. As far as my examination of Walter E. Frey went, I found no evidence of disease. I found him to be in a normal condition of health and so reported to the defendant. On or about June 1, 1932, I again examined Walter E. Frey in a less extensive manner. I examined his heart and I found nothing abnormal that I could detect, which I reported to defendant.

Thereupon defendant's motion for dismissal was renewed and denied, and an exception allowed as to each policy separately.

IV.

The court erred in overruling defendant's objection to questions as follows:

Q. If I told you, Doctor, that an autopsy surgeon found a heart acutely dilated in all chambers and filled with a dark fluid blood, the heart about one and one-half times its normal size, and there are scattered regions of fibrosis throughout; the coronary vessels of the left side indicate a marked thickening and in the descendens branch about one and one-half inches from its origin there is a complete occlusion by virtue of marked sclerosis of the vessel. There

is no acute infarction seen. The coronary vessels of the right side, although thickened to a moderate degree, are in no way comparable to those of the left side. There is some sclerosis at the aortic cusps. The cusps are not flexible. Do these findings necessarily indicate that the person examined was not in good health prior to the time of death?

Mr. Boland. I object to the question as not comprehensive of the testimony of Doctor Berger. Doctor Berger indicated in his testimony that he had examined the heart during his autopsy and had excluded all the accumulated blood and came to the conclusion that the heart was one and one-half times its normal size for a long period prior to death, and anterior to the time when the application here was signed. Therefore, the question directed to the witness is not comprehensive, and therefore is objectionable. It does not state the testimony as given by Doctor Berger.

The Court. Objection overruled; exception.

V.

The court erred in denying the motion made by defendant at the termination of the case, as follows:

The testimony being closed, defendant moved the court for a directed verdict in favor of the defendant as to each policy upon each of the following grounds, and the court assented that defendant should not be required to repeat the grounds as to each policy, as follows:

That the preponderance of the evidence does not establish that there was any delivery of any policy with intent to consummate a contract of

insurance. That the preponderance of the evidence does not establish, in fact, there is no evidence to establish, that there was any delivery of the policy to the insured, Walter E. Frey; in fact, the evidence discloses that he never, so far as the evidence shows, had his hands on the policy or ever knew that it had been left on the table, as testified, and he was the only party to this contract; Mrs. Steventon and Mr. Herbert Frey, etc., are not parties to the contract at all; the only contract was between Walter Frey and the defendant insurance company. There was no acceptance of any policy by Walter E. Frey, no premium was paid upon any policy by Walter E. Frey, or by anyone on his behalf, or otherwise. No policy was delivered to Frey, either by manual transmission or with intent to consummate a contract, which is the legal significance of delivery, while he was in good health. No policy was accepted by Walter E. Frey while he was in good health, and no premium on any policy was paid by Walter E. Frey, or by anyone on his behalf while he continued in good health. No policy was ever delivered to Walter E. Frey, or accepted by Walter E. Frey, or premium paid by Walter E. Frey while he was in good health.

The foregoing motion was denied and exception allowed.

VII.

The court erred in instructing the jury as follows, as to each instruction so given an exception was duly allowed:

(A) The court instructs you that a policy of insurance will, in the absence of evidence to

the contrary, be presumed to take effect upon its date.

(B) The court instructs you that delivery of a policy of insurance is effective by sending the policy to an agent of the company for the sole purpose of making delivery to the insured or the beneficiary.

(C) If it be intended that a policy of insurance should be in force before it is actually handed over, it will be deemed constructively delivered.

(D) If you find that certain policies were executed and mailed from the home office of the insurance company on June 1st and if you further find that it was the intention of the parties that they should go into effect on that date, then you should be warranted in finding that the policies were delivered on June 1st.

(E) The court instructs you that possession of a policy of insurance by the beneficiary is prima facie evidence of its delivery as a valid and existing contract. The plaintiff in this action by producing and putting in evidence the three policies dated the first day of June, 1932, established a prima facie case to recover upon said policies and the burden of overcoming said prima facie case thereupon shifted to the defendant insurance company.

(F) Was it the intention of the parties that the policies should be deemed delivered when they were executed and mailed in New York June 1st and was the deceased in good health at that time?

(G) After the jury retired the following occurred:

The Court. The following note was sent from the Jury to the Court:

"Hon. Judge Kerrigan

We the Jury in this case request additional instruction having to do with Exhibit 'J'.

We desire, your Honor, to know if it was essential that these forms be signed by the applicant on delivery of the policies in order to complete the contract. This refers to the first two policies of $10,000 each #4591472 #4591473.

Gentlemen: My answer is No.

Frank H. Kerrigan, U. S. District Judge."

Mr. Boland. The defendant notes an exception to that.

ARGUMENT.

FIRST QUESTION.

PREPAYMENT OF THE PREMIUM IS A CONDITION PRECEDENT TO THE TAKING EFFECT OF THE POLICIES, WHICH COULD NOT BE WAIVED EXCEPT BY CERTAIN SPECIFIED OFFICERS.

The application provided, as will be recalled:

"The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary, or by the person who herein agrees to pay the premiums, during the insured's continuance in good health, and unless and until the first premium shall have been paid during the insured's continuance in good health."

And also provided:

"It is agreed that no agent or other person except the President, Vice-President, a Second

> Vice-President, or a Secretary of the company has power on behalf of the company to bind the company by making any promise respecting benefits under any policy issued hereunder or accepting any representation or information not contained in this application, or to make, modify or discharge any contract of insurance, or to extend the time for payment of a premium, or to waive any lapse or forfeiture or any of the company's rights or requirements."

It will also be recalled that no premium was ever paid by the insured, or by any one on his behalf. Also, Mr. Steinfeld, the agent, made continuous effort to collect the premium. Also, that the checks which he gave to Mr. Murray, the cashier, were never paid; that is, that he stopped payment within two or three days when he found that neither the insured nor beneficiaries would pay the premium. In other words, no premium was ever paid; nor was there ever any effective waiver of the premium.

It is now established in the jurisprudence of the Federal courts, that these conditions precedent, and the limitations upon the power of the waiver thereof, are valid and will be meticulously enforced. Argument by me upon this subject is superfluous. Abler men than I am have said it better than I can.

> *Bergholm v. Peoria L. Ins. Co.,* 284 U. S. 489, 76 L. ed. 416.

This was an action upon a life insurance policy which it was claimed by defendant insurance company had lapsed for non-payment of premiums. The beneficiary sued to recover upon the ground that

prior to lapse the insured had become totally disabled, and that such disability under the terms of the policy waived payment of premiums. The policy provided: "Upon receipt by the company of satisfactory proof that the insured is totally and permanently disabled, as hereinafter defined, the company will [waive payment of premium]." The question to be determined was whether the provision for furnishing proof of disability was a condition precedent, and after discussing the conflict between the different districts, the Supreme Court said:

> "Here the obligation of the company does not rest upon the existence of the disability; but it is the receipt by the company of *proof* of the disability which is definitely made a condition precedent to an assumption by it of payment of the premiums *becoming due after the receipt of such proof.* * * *.
>
> Contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood, in the absence of ambiguity, in their plain, ordinary and popular sense. Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 462, 463, 38 L. ed. 231, 235, 236, 14 S. Ct. 379. As long ago pointed out by this court, the condition in a policy of life insurance that the policy shall cease if the stipulated premium shall not be paid on or before the day fixed is of the very essence and substance of the contract, against which even a court of equity cannot grant relief. Klein v. New York L. Ins. Co., 104 U. S. 88, 91, 26 L. ed. 662, 663; New York L. Ins. Co. v. Statham, 93 U. S. 24, 30, 31, 23 L. ed. 789, 791, 19 Am. Rep.

512; Pilot L. Ins. Co. v. Owen (C. C. A. 4th), 31 F. (2d) 862, 866. And to discharge the insured from the legal consequences of a failure to comply with an explicitly stipulated requirement of the policy, constituting a condition precedent to the granting of such relief by the insurer, would be to vary the plain terms of a contract in utter disregard of long settled principles."

MacKelvie v. Mutual Ben. L. Ins. Co., 287 Fed. 660.

Action upon an insurance policy. Premium had not been paid, and the application, as will appear from the decision, required prepayment. The court said:

"The question which these facts present is one of general jurisprudence, and the decision of no state court can be regarded as controlling. Aetna Life Insurance Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. ed. 356. In that case the place of contract was admittedly Georgia, and it was argued that a decision of the Georgia court was controlling. The Supreme Court held it was not controlling.

The law is settled in this court that, when a life insurance policy contains, as this one did, the provision that it 'will not take effect, unless the first premium or agreed installment thereof shall be actually paid during the lifetime of the insured', the provision means exactly what it says and will be enforced. And if the policy contains, as this one did, the express provision that 'agents are not authorized to make, alter or discharge contracts', the waiver relied on must be one by the company itself, and no attempted waiver by an agent will be treated as its equiva-

lent. In Pennsylvania Casualty Co. v. Bacon, 133 Fed. 907, 67 C. C. A. 497, a policy of insurance stated that it was not to take effect 'unless the premium is actually paid previous to any accidents upon which claim is made', and it provided that no waiver should be binding on the insurer unless indorsed on the policy and signed by the president or secretary of the company. This court held that a subagent had no authority to accept a note in lieu of cash for the first premium, and to thereby waive the provisions of the policy. The decisions of the Supreme Court in Northern Assurance Co. v. Grand View Building Association, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. ed. 213; Penman v. St. Paul Fire & Marine Ins. Co., 216 U. S. 311, 30 Sup. Ct. 312, 54 L. ed. 493; Aetna Life Insurance Co. v. Moore, 231 U. S. 543, 34 Sup. Ct. 186, 58 L. ed. 356; Lumber Underwriters v. Rife, 237 U. S. 605, 35 Sup. Ct. 717, 59 L. ed. 1140; Mutual Life Ins. Co. v. Hilton-Green, 241 U. S. 613, 36 Sup. Ct. 676, 60 L. ed. 1202—support the same doctrine. The provisions that a policy of life insurance shall not take effect unless the first premium is actually paid in cash during the lifetime of the person insured is valid and will be enforced according to its terms."

Aetna Life Ins. Co. v. Johnson, 13 Fed. (2) 824.

Action upon insurance policy. The premium was not paid. The application stated:

"'I also acknowledge that all policies and agreements made by said Aetna Life Insurance Company are signed by one or more of the execu-

tive officers; and that no agent or other person not an executive officer can grant insurance, or waive any condition of its policies, or make any agreement which shall be binding upon said company'. The policy provides that the application was made a part of the policy contract, and that the policy and application should constitute the entire contract between the parties. It recited that the agreement to insure was made in consideration of the annual premium of $238.26, to be paid to the company at its home office, or to its agent, at or before 5 o'clock p. m. of the 26th day of January in each and every year. It also contained this provision: 'This policy shall not take effect until the first premium thereon shall have been actually paid, during the good health of the insured, a receipt for which payments shall be the delivery of the policy'."

The court said:

"It is a rule generally adopted in the United States courts that, if a policy of life insurance provides that it is not to take effect until the first premium is paid, recovery cannot be had upon the policy, when it appears that the premium was unpaid at the date of the death of the insured, unless it appears that payment was waived by action of the insuring company.

A waiver of this requirement cannot be made by an agent of the insurance company, *when the policy provides that no person except other designated officers of the insurance company may alter or waive any provision of the policy,* unless the insuring company has authorized the waiver to be made. Mutual Reserve Fund Life Ass'n. v. Simmons, 107 F. 418, 422, 424, 46 C. C. A.

393; Pennsylvania Casualty Co. v. Bacon, 133 F. 907, 909, 67 C. C. A. 497; MacKelvie v. Mutual Ben. Life Ins. Co. (C. C. A.), 287 F. 660, 663."

Person v. Aetna Life Ins. Co., 32 F. (2d) 459.

Action to cancel and rescind life insurance policy upon the ground that the first premium was not paid while applicant was in good health. Defendant moved to dismiss. This motion was denied and this judgment was affirmed. The complaint alleged among other things:

> "That said application, among other things, provided: 'It is agreed that no insurance hereon shall be effective until a policy is issued and the entire first premium has been paid during the good health of the proposed insured, and within sixty days from the date hereof. * * *.
>
> The motion to dismiss was denied; defendants elected to stand upon their motion and refused to plead further; plaintiff deposited the amount of the premium in court, and a decree was entered canceling the policy. The present appeal followed.
>
> The main question involved in the case is what construction should be placed upon the above quoted clause in the policy. Is good health on the part of the insured at the time the first premium is paid a condition precedent to the taking effect of a valid contract of insurance, or does the contract of insurance take effect at the time of the payment of the first premium, unless at that time the insured knew or had reason to suspect that he was not in good health? The former construction was adopted by the court below; the latter is contended for by appellants.

> By the great weight of authority, both in the federal and state courts, the former of these two constructions is placed upon such a clause."

The court discusses several of the federal cases and then says:

> "Cooley's Briefs on Insurance (2d Ed.), vol. 1, p. 693, states the rule as follows: 'Where an application for a life insurance policy, or the policy itself, or both the application and the policy, contain a provision to the effect that the policy shall not become operative until the first premium thereon has been actually paid to the company or to an authorized agent during the good health of the applicant, actual payment of the first premium while insured is in good health is a condition precedent to the liability of the insurer, unless waived.' Many state court decisions are cited in support of the rule."
>
> *Inter-Southern Life Ins. Co. v. McElroy,* 38 Fed. (2) 557.

Action upon insurance policy. It was admitted the premium had not been paid, and the court found that the policy had been delivered. "The application which was, by proper reference, made a part of the policy, contained a provision: 'That, except as otherwise stated in the form of binding receipt hereto attached bearing the same number as this statement, no contract of insurance shall be deemed made, and the company shall incur no liability until a policy shall be issued and delivered to me personally and the first premium thereon actually paid during my lifetime and while I am in good health.'" The court said:

"The insured, in fact, paid nothing on the premium, nor did the soliciting agent pay anything under his agreement with the insured heretofore set out, until after the death of the insured. The provision in the application and policy, to the effect that the policy should not become effective until the first premium should be paid during the good health of the insured, was valid and binding as a condition precedent. Person v. Aetna Life Ins. Co. (C. C. A.) 32 F. (2d) 459, 466; Aetna Life Ins. Co. v. Johnson (C. C. A.) 13 F. (2d) 824; Mutual Reserve Fund Life Ass'n v. Farmer, 65 Ark. 581, 47 S. W. 850."

The court further said:

"And the policy itself contains the following provision: 'Only the President, a Vice President or the Secretary has power in behalf of the Company to make or modify this or any contract of insurance or to extend the time for paying any premium, and the Company shall not be bound by any promise or representation heretofore or hereafter given by any other person. No agent is authorized to waive forfeitures, or to make, modify or discharge contracts, or to waive or make conditional the payment of any premium or part thereof.' A waiver of this requirement cannot be made by a soliciting agent of the insurance company when the policy provides that no person except other designated officers of the company may alter or waive any provisions in the policy, unless the insuring company has authorized the waiver to be made. Aetna Life Ins. Co. v. Johnson (C. C. A.), 13 F. (2d) 824, 825; Equitable Life Assur. Society v. McElroy (C.

C. A.), 83 F. 631; McKelvie v. Mutual Benefit Life Ins. Co. (C. C. A.), 287 F. 660; Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. ed. 356; Prudential Life Ins. Co. v. Moore, 231 U. S. 560, 34 S. Ct. 191, 58 L. ed. 367; Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 S. Ct. 133, 46 L. ed. 213; Bradley v. N. Y. Life Ins. Co. (C. C. A.), 275 F. 657; Jenkins v. International Life Ins. Co., 149 Ark. 257, 232 S. W. 3."

The court held it was error not to have granted a directed verdict.

Curtis v. Prudential Ins. Co., 55 Fed. (2) 97.

Action upon insurance policy. The court stated:

"The application was signed by the insured, and contained the following clause: 'I further agree that the policy herein applied for shall be accepted subject to the privileges and provisions therein contained and that unless the full first premium is paid by me at the time of making this application, the policy shall not take effect until issued by the company and received by me and the full first premium thereon is paid, while my health, habits and occupation are same as described in this application.'"

Some portion of the premiums were paid, but not in full. The court said:

"The validity of the provisions in the application and the policy is unquestioned. Similar provisions have been passed upon by the courts, and, so far as we can find, have been uniformly approved. * * *.

* * * 'The provisions that a policy of life insurance shall not take effect unless the first premium

is actually paid in cash during the lifetime of the person insured is valid and will be enforced according to its terms.' See, also, Sturgill v. New York Life Ins. Co., 195 N. C. 34, 36, 141 S. E. 280.

We believe this to be a wholesome rule, because it is clearly apparent that the business of life insurance, which is so important a part of our civilization in this latter-day world, could not be carried on were the insurance companies bound by every act or statement of a local agent; especially one whose duty is mainly that of soliciting or collecting. If it were otherwise, great injustice would follow, and a great loss be imposed upon holders of life insurance policies, because of the increased burden upon the companies that would result. While the courts are careful, in every way, to protect the interest of beneficiaries under insurance policies, yet there is a limit which should not be exceeded. The reasonableness of the respective contentions should be the yardstick with which to measure the justice of the matter. * * *.

While we recognize the force of the contention made on behalf of the plaintiff that forfeitures are not favored at law, yet where there has been no contract there can be no forfeiture of a contract, and we think this is a case of no contract. None of the conditions precedent especially stipulated as necessary before the contract became binding was ever properly waived by any one having authority. Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 57 L. ed. 879; New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 29 L. ed. 934; Hoffman v. John Hancock Mutual Life Ins. Co., 92

U. S. 161, 23 L. ed. 539; Philadelphia Life Ins. Co. v. Hayworth (C. C. A.), 296 F. 339; Aetna Life Ins. Co. v. Johnson (C. C. A.), 13 Fed. (2d) 824; Dodd v. Aetna Life Ins. Co. (C. C. A.), 35 F. (2d) 673; Bradley v. New York Life Ins. Co. (C. C. A.), 275 F. 657.

This seems to be the rule supported by the great weight of authorities in the federal courts, and the questions here involved, being questions of general jurisprudence, are to be determined by the federal rule. Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. ed. 356; MacKelvie v. Mutual Ben. Life Ins. Co. (C. C. A.) 287 F. 660, 663; Pilot L. Ins. Co. v. Owen (C. C. A.), 31 F. (2d) 862."

New York Life Ins. Co. v. McCreary, 60 Fed. (2d) 355.

Action upon life insurance policy. The application stated as follows:

"'It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination.'"

No immediate payment was made which would put the policy immediately in force. The court, after discussing the terms of the policy, states:

"It follows that no contract of insurance ever became effective unless, as claimed by the plaintiff, these conditions of the contract were waived.

It is contended that these conditions were waived because of the acts and knowledge of the defendant's soliciting agent. It is, however, to be observed that the application signed by the applicant contains specific provision that only the president, a vice president, a second vice president, a secretary, or the treasurer of the company could waive any of the company's rights or requirements. The principles of the general law of agency are applicable to insurance companies and their agents (Globe Mutual Life Ins. Co. v. Wolff, 95 U. S. 326, 24 L. ed. 387), and insurance companies, unless inhibited by valid statutory provisions, may limit the authority of their agents by agreements contained in the application for insurance, and such agreements are binding upon the applicant. Aetna Life Ins. Co. v. Moore, 231 U. S. 543, 34 S. Ct. 186, 58 L. ed. 356; Northern Assurance Co. v. Grand View Bldg. Ass'n, 183 U. S. 308, 22 S. Ct. 133, 46 L. ed. 213; Jensen v. New York Life Ins. Co. (C. C. A.), 59 F. (2d) 957; Inter-Southern Life Ins. Co. v. McElroy (C. C. A.), 38 F. (2d) 557; Curtis v. Prudential Life Ins. Co. (C. C. A.), 55 F. (2d) 97. * * *

The applicant, of course, is charged with notice of the agent's want of authority, and hence no resort can be had to the doctrine of apparent, ostensible, or implied authority. New York Life Ins. Co. v. Fletcher, 117 U. S. 519, 6 S. Ct. 837, 843, 29 L. ed. 934; Jensen v. New York Life Ins. Co. (C. C. A.) 59 F. (2d) 957; Slocum v. New York Life Ins. Co., 228 U. S. 364, 33 S. Ct. 523, 527, 57 L. ed. 879, Ann. Cas. 1914D, 1029. In New York Life Ins. Co. v. Fletcher, supra, in speaking of the power of a soliciting

agent, it is said: 'Here the power of the agent was limited, and notice of such limitation given by being embodied in the application, which the assured was required to make and sign, and which, as we have stated, he must be presumed to have read. He is therefore bound by its statements.' "

It was then contended that the statutes of Nebraska made the soliciting agent the agent of the insurer. After quoting the statutes, the court says:

"These statutes do not sustain plaintiff's contention. They, to be sure, make the soliciting agent the agent of the insurer, but they leave the extent and nature of his authority as such agent of the insurer to be determined by the general law of agency. Sun Insurance Office v. Scott, 284 U. S. 177, 52 S. Ct. 72, 74, 76 L. ed. 229; Jensen v. New York Life Ins. Co. (C. C. A.) 59 F. (2d) 957; Aetna Life Ins. Co. v. Roewe (C. C. A.) 38 F. (2d) 393; Maryland Casualty Co. v. Campbell (C. C. A.) 255 F. 437; Fidelity-Phenix Fire Ins. Co. v. Handley (C. C. A.) 296 F. 902; Newsom v. New York Life Ins. Co. (C. C. A. 6) 60 F. (2d) 241."

CONTENTION OF PLAINTIFF.

It will be contended, I have no doubt, by plaintiff that the admission of payment of the premium in the policies is conclusive of that fact, under the law of California. In the proper case this may be so, but this is not such a case. Section 2598, Civil Code of California, provides as follows:

> "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid."

It has never been held in California, in fact, in principle the contrary has been held, that such an admission in the policy prevails over an unperformed condition precedent. This honorable court had that question before it in a recent case.

New York Life Ins. Co. v. Gist, 63 F. (2d) 732. This was an action to cancel and rescind the policy. This honorable court said:

> "The ground upon which the insurance company seeks to cancel the policy is that between the date of the application for the insurance and the delivery of the policy the insured consulted a physician, and that, when the policies were delivered to the insured, the company was ignorant of that fact."

The application provided as follows:

> "'It is mutually agreed as follows: 1. That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination.'"

This honorable court determined upon the findings of the lower court that the applicant was not in good health.

"The appellees contend that, inasmuch as the policy here in question contained the recital that the premium had been paid on the 16th of November, 1925, the company thereby waived the condition precedent with reference to the consultation with or treatment by physicians subsequent to that date, and that the issuance of the policy with this recital by the officers of the company at its head office in New York, and the mailing of the policy to the agent at Tulare, Cal., for delivery by that agent to the insured, was a constructive delivery at the time of such subscription and mailing on November 30, 1925, and made the policy effective from the date thereon; namely, November 16, 1925. This argument is predicated in large part on the law of California (section 2598 Cal. Civ. Code), which expressly provides that: 'An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid.' "

In respect of this contention, this honorable court said:

"The preparation of the policy with a view to its delivery in a form which acknowledged receipt of a premium which had not yet been received was a mere preparation for the contract which was to be consummated at the time of the delivery of the policy to the insured and his acceptance thereof. While it is true that section 2598 of the Civil Code of California entered into and became a part of the contract of insurance [Aetna Life Ins. Co. v. Geher (C. C. A. 9), 50 F. (2d) 657], that section

merely provides that, by a recital in the policy that the premium has been paid, the insurance company is estopped to deny the payment so as to make the policy ineffective for nonpayment of premium. Evidently the statute is directed to the situation where the premium is taken care of by a note or some other credit arrangement, so that the premium has not been paid in the literal sense, since the company has not received the money therefor. This statute prevents the insurance company from taking advantage of the provision in the policy that it shall not become effective until the premium is actually paid, as has sometimes been attempted in such cases. Palmer v. Continental ns. Co., 132 Cal. 68, 71, 64 P. 97; Vierra v. N. Y. Life Ins. Co., 119 Cal. App. 352, 6 P. (2d) 349, supra; Masson v. New England M. L. Ins. Co., 85 Cal. App. 633, 260 P. 367."

This honorable court then concluded:

"As we have pointed out above, the trial court was in error in holding that the policy of insurance became effective as of November 16, 1925, and, consequently, its conclusion that the consultations and treatments by the physician were immaterial is also erroneous. On the contrary, said consultations and treatments prevented the policy of insurance from becoming effective at all under the express terms of the application. Subar v. N. Y. Life Ins. Co., supra; Hurt v. N. Y. Life Ins. Co. (C. C. A. 10), 51 F. (2d) 936; N. Y. Life Ins. Co. v. Watkins, 229 App. Div. 211, 241 N. Y. S. 441; Jones v. N. Y. Life Ins. Co., 69 Utah 172, 253 P. 200.

Decree reversed, and the trial court directed to enter a decree canceling the policy and ordering the return of the premium paid."

It will be observed that in the foregoing case this honorable court gave effect to the condition precedent in the application. There is no case to the contrary in California. On the contrary, the Supreme Court of California has consistently recognized the legality and effectiveness of these conditions precedent and the right to limit the power and authority of the agent, just as have the Federal courts, although, perhaps, not upon the precise question here presented; but there can be no difference in principle.

Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746.

Action upon policies of life insurance. In an application insured represented himself to be in good health, etc. It transpired that he was not, and that this fact was known to the soliciting agent. It was contended that the knowledge of the agent was the knowledge of the principal. The policy contained the usual clause limiting the agent's authority. In holding for the defendant, the court said:

> "And that Clark, as soliciting agent, had neither actual nor ostensible authority to act so as to waive the truthfulness of any statement in the application for the policy, or to relieve the applicant from any warranties therein, or to bind the company by any knowledge he might possess in relation to such statements or warranties is clearly shown by the terms of the application itself, which expressly limits the power and authority of soliciting agents in those and in all particulars relative to matters pertaining to such application.
>
> An insurance company can, like any other principal, prescribe limitations upon the power

and authority of agents, and persons dealing with such agents with knowledge of the limitations upon their authority are bound by the restrictions imposed. * * *.

As, by the terms of the application and the knowledge of the insured, the soliciting agent had no authority to bind the company in any way, either by express agreement or the possession of any knowledge or information concerning the falsity of any of the statements or warranties contained in the application, mere possession of knowledge of such falsity was not knowledge acquired within the scope of his authority, and therefore cannot be said to be the knowledge of the company. * * *.

The position taken here by appellant simply is that because the agent had information that a statement the assured warranted to be true was false, the mere possession of this knowledge bound the company and relieved the assured from his warranty, notwithstanding it was expressly provided in the application, and the insured knew, that the company could not be so bound, and could only be bound by having such information imparted in writing to the home officers who were authorized to act upon it. This position could only be sustained by holding that it was not competent for the comany to limit the authority of its agents, and that the insured is not bound by the knowledge of such limitations. Of course, it cannot be so held. In the case at bar there is no question of fraud, deception, or misrepresentation practiced by the agent. The sole question is one of contract. The application contained a limitation on the authority of the agent expressly providing against the company being bound by any

information possessed by him not disclosed in the application, and declaring the only way it could be bound,—namely, by written statements furnished the officers at the home office for their action upon them. The assured knew all this and agreed to it. It was the contract of the parties upon the subject of the agent's authority, and prescribed the only method in which the company could be bound, which it is not pretended was followed, and we know no reason why the assured should not be controlled by the terms of the contract and the limitations on the authority of the agent imposed thereby."

Sharman v. Continental Ins. Co., 167 Cal. 117.

Action upon a fire insurance policy. Policy required the insured to be the sole and unconditional owner of the property. It transpired that he was not, and that the agent of the insurer knew this fact. The court said:

"The policy which was delivered by the defendant and accepted by the plaintiff constituted the contract between them. It was accepted subject to the condition that it was void if the stipulation therein contained that plaintiff was the sole and unconditional owner of the property was untrue. It further provided that 'no officer, agent or other representative of this company shall have power to waive any provision or condition in this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto', and as to such provisions or conditions such officer, agent, or representative shall not be deemed to have waived them unless such waiver be written upon or attached to the policy.

An insurance company, like any other principal acting through agents, may limit their powers, and this was done by defendant by clear and plain terms in the policy here in question. When plaintiff accepted it it became the contract between him and the company and he was charged with knowledge of its terms, among others the limitations upon the power of the agent of the company. (Westerfeld v. New York Life Ins. Co., 129 Cal. 68 [58 Pac. 92, 61 Pac. 667]; Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 715 [91 Pac. 266]; Blunt v. Fidelity & Casualty Co., 145 Cal. 268 [104 Am. St. Rep. 34, 67 L. R. A. 793, 78 Pac. 729].) * * *.

The contention solely is that because Wade was agent of the company—the ostensible agent at least—his knowledge bound the defendant. But Wade was merely a soliciting agent of the defendant. He had no authority, actual or ostensible, to waive conditions in the policy. This was not within the scope of any apparent authority he possessed, and his knowledge of the true condition of the title of plaintiff, not communicated to the general agent of the company, was not the knowledge of the latter. The extent of his duties was merely to solicit insurance and send in applications therefor to the general agent of the defendant. He had no authority to consummate the contract of insurance and issue the policy, and it is only an agent of this character who could waive conditions notwithstanding the apparent limitations of the power of all agents to waive the conditions or stipulations of a policy. A soliciting agent could not. (Iverson v. Metropolitan Life Ins. Co., 151 Cal. 746 [13 L. R. A. (N. S.) 866, 91 Pac. 609]; Fidelity etc. Co. v. Fresno Flume Co., 161

Cal. 466 [37 L. R. A. (N. S.) 322, 119 Pac. 464]; McIntosh v. Agricultural Fire Ins. Co., 150 Cal. 440 [119 Am. St. Rep. 234, 89 Pac. 102]; Raulet v. Northwestern Ins. Co., 157 Cal. 213 [107 Pac. 292].)"

Cayford v. Metropolitan Life Ins. Co., 5 Cal. App. 715.

Action upon a policy of life insurance. A premium not being paid, the agent of defendant called upon insured's wife, beneficiary; was told she was unable to pay. The agent called several times later to collect, but, in fact, payment was never made. Policy contained the usual clause limiting the authority of the agent. The plaintiff relied upon the case of *Knarston v. Manhattan Life,* 124 Cal. 74, to the effect that attempts to collect the premium waived forfeiture. The court said:

"There is no doubt that this case, as claimed by the respondent, would be within the doctrine of the Knarston case if the acts of Pittman were the acts of the company. Counsel for the respondent argues that the possession of the receipt after its due date by Pittman, the collector of the company, implied the power to deliver it after that date; that there appeared on the face of the receipt no limitation of its validity if delivered after the due date of the premium; that accordingly, if it had been in fact delivered by Pittman, though after the due date, his act would have been the act of the company, and the forfeiture would have been waived. We cannot agree with this view. Mrs. Cayford did not know that Pittman had the premium receipt, and she knew nothing of its contents. No

knowledge of the extensions of time to pay the premium, granted by Pittman to the insured, was brought home to the company. The limitation, in the conditions of the policy, on the authority of subordinate agents to waive forfeitures or collect overdue premiums is valid. (Shuggart v. Lycoming Fire Ins. Co., 55 Cal. 408; Enos v. Sun Ins. Co., 67 Cal. 621 [8 Pac. 379]; Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 77 [58 Pac. 92, 61 Pac. 667].) The assured knew of this provision, or, what is the same thing, is charged with knowledge of it. (Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 77 [58 Pac. 92, 61 Pac. 667].) Under the circumstances of this case it cannot be held that the company waived the forfeiture caused by the failure to pay the premium when due. Authority to collect premiums does not imply authority to extend the time for the payment of such premiums, or to waive a forfeiture resulting from nonpayment."

Toth v. Metropolitan Life Ins. Co., 123 Cal. App. 185.

It was here contended that defendant, through its soliciting agent, had created an oral contract of insurance. The decedent, Toth, had signed an application which contained the usual clause limiting the powers of the agent. The court held that under these limitations there could not be an oral contract, saying:

"A mere soliciting agent or other intermediary operating between the insured and the insurer has authority only to initiate contracts, but not to consummate them, and cannot bind his principal by anything he may say or do during the

preliminary negotiations. (14 Cal. Jur., p. 457; Browne v. Commercial Union Assur. Co., 30 Cal. App. 547, 554 [158 Pac. 765]; Sharman v. Continental Ins. Co., 167 Cal. 117, 124 [52 L. R. A. (N. S.) 670, 138 Pac. 708].) The evidence in the case at bar shows without contradiction that Thomas was only a soliciting agent. He therefore had no authority to make any contract of insurance, either oral or written; and, even if we assume that he attempted to make an oral contract to insure decedent, his lack of authority so to do would prevent such purported oral contract from being valid or effective.

Moreover, the limitation of Thomas' authority as a soliciting agent of defendant was affirmatively brought to the attention of decedent when decedent made the application for insurance, which application contained the provision that no agent or any other person except officers of defendant company has power to 'make, modify or discharge any contract of insurance' or to bind the defendant in any way 'by making any promises respecting any benefits under any policy issued hereunder'; and also the provision that defendant would incur no liability under the application until it had been received, approved and a policy issued and delivered with a full first premium paid to and accepted by defendant. The decedent signed the application and it is presumed that he knew its contents. (Fidelity & Cas. Co. v. Fresno Flume & Irr. Co., 161 Cal. 466, 472 [37 L. R. A. (N. S.) 322, 119 Pac. 646].) By these provisions of the application express notice was given to decedent that the officers of the defendant reserved the exclusive right to determine whether or not defendant

would insure him, and also that Thomas had no right or authority to bind defendant by any promises or purported oral agreements. (Iverson v. Metropolitan Life Ins. Co., supra.) Thomas, therefore, had neither actual nor ostensible authority to make the purported oral contract relied upon by appellant and consequently no completed contract of insurance on the life of decedent, either oral or written, was ever entered into by decedent and defendant. An insurer is not bound by representations or purported agreements made by an unauthorized agent. (14 Cal. Jur., p. 458; Fidelity & Cas. Co. v. Fresno Flume & Irr. Co., supra.)

An examination of the California cases, in which section 2598, Civil Code, has been referred to, will show the correctness of the statement of this honorable court in the *Gist* case (63 Fed. (2d) 732):

> "Evidently the statute is directed to the situation where the premium is taken care of by a note or some other credit arrangement so that the premium has not been paid in a literal sense, since the company has not received the money therefor."

In each of the cases, such was the situation.

In the case of *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, there was no limitation upon the agent's authority; in fact, it appears that the agent had affirmative authority to extend credit, and credit was extended.

In the case of *Griffith v. Life Insurance Co.*, 101 Cal. 627, there was no limitation upon the agent's

authority, and promissory notes were given and accepted.

In the case of *Palmer v. Continental Ins. Co.,* 132 Cal. 68, there was no limitation upon the agent's authority; in fact, the agent had the power to create contracts, and the premium was paid partly in cash and partly by note.

In the case of *Masson v. New England M. L. Ins. Co.,* 85 Cal. App. 633, there was no limitation upon the agent's authority, and the premium was paid in cash and notes.

In the case of *Courdway v. Peoples Mut. Life Ins. Co.,* 118 Cal. App. 530, the agent paid the full net premium to the company so that as between the insurer and insured there would be no question of payment.

A detailed consideration of the foregoing cases follows:

Farnum v. Phoenix Ins. Co., 83 Cal. 246.

Action upon a fire insurance policy. On May 2, 1887, plaintiffs verbally applied to the local agent of defendant for a policy of fire insurance. The policy was required to be and was countersigned by the local agent and delivered to plaintiffs on May 24. The agent agreed to give the plaintiffs a credit on the premium until October 1, and it was the custom of defendant insurance company to allow its agents to give a credit for premiums for a term of 60 days. On September 5 the property was destroyed by fire, and on September 30 payment of premium was tendered the agent. The policy as delivered recited a

consideration of $73.50, but did not expressly acknowledge receipt of payment. Upon trial motion for nonsuit was granted. In reversing the judgment, the court said:

> "It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid is waived by the *unconditional* delivery of the policy to the assured as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, and that in such case the company is liable for a loss which may occur during the period of the credit. * * *
>
> In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least sixty days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. 'An insurance agent clothed with authority to make contracts of insurance or to issue policies stands in the stead of the company to the assured.' * * *
>
> It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case,—from May

2 to October 1, 1887,—but was limited to a credit of sixty days; for it is sufficient that he had authority to give a credit of sixty days. The credit was given as a valid credit for sixty days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. * * *

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance, and to countersign and deliver policies in San Joaquin County, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit. * * *

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. * * *

The authorities before cited show that a local agent who is clothed with general power to solicit and consummate contracts of insurance within a certain territory stands in the stead of the company, and represents its whole power to give validity to the contracts which he is authorized to execute and deliver, and to waive conditions precedent to liability by oral agreement, including the condition as to the mode of waiver of such conditions precedent."

Griffith v. Life Insurance Co., 101 Cal. 627.

Action upon two life insurance policies. Application was made by Griffith, husband of plaintiff, to one

Mouser, soliciting agent for defendant, for two policies of insurance upon his life, payable to plaintiff, under an agreement that Griffith should deliver to Mouser two promissory notes for the first annual premium. The policies were issued and one policy and one note were exchanged; Griffith requesting the other to be returned as he could not pay the note covering the premium, which was done, and the note surrendered. After maturity of the other note, Griffith being unable to pay, surrendered the policy, which was canceled and the other note returned. No premium was ever paid upon either policy. The court discussed the policies separately. The court held for the defendant as to the first policy, saying:

> "Another proposition which may be considered as established is this: An express provision in a policy of insurance, that the company shall not be liable on the policy until the premium is actually paid, is waived by the unconditional delivery of the policy to the assured, as a completed and executed contract under an express or implied agreement that a credit shall be given for the premium, and in such a case the company insuring is liable for a loss which may occur during the period of credit. (Farnum v. Phoenix Ins. Co., 83 Cal. 246, and cases cited.)
>
> These propositions are stated as prescribing limitations upon the insurers in cases where the contract is fully consummated, but do not go to the essential point in our present inquiry, viz.: Was it so consummated as to bind the insurer?
>
> Griffith had not only represented in his statement that the first annual premium had been paid in cash, but he had also agreed in the same

statement, 'that any policy which may be issued under this application shall not be in force until the actual payment to, and acceptance of, the premium by said company, or its authorized agent, during my lifetime and good health'.

We may concede that this agreement might have been waived by a delivery of the policy without such payment, but it by no means follows that the same result follows without a delivery, or that the agent would be legally bound to deliver without payment. In such a case it is the act of delivery with intent that it shall take effect that constitutes the waiver, and raises an estoppel against the insurer, and where the intent and act are wanting there is no waiver.

Up to the time of delivery the agreement to give credit was a mere personal one on the part of the solicitor, without authority from defendant, which he might and did cancel with the consent of Griffith before consummation of the contract."

In holding for the plaintiff as to the second policy, the court said:

"We think the doctrine is well settled that where a valid policy is regularly delivered in pursuance of a consummated contract, to one who has procured insurance upon his own life, payable to another, the insured cannot surrender the policy without the consent of the beneficiary. * * *

The agents of defendant were not authorized by defendant to take any thing except money in payment of premiums. They did consent to take the note in question in lieu of money, the effect of which, according to the evidence, was that

they became individually liable to defendant for so much money, less their commissions.

It was in effect, so far as defendant was concerned, a payment of the premium to the agents who held the note in lieu of so much money with which they were chargeable. It was, as to defendant, a payment of the premium to the agents, and not an extension of the time of payment. The note was payable to order, duly indorsed, and, so far as appears, in no way referred to the premium or policy.

Under such circumstances, its nonpayment at maturity did not work a forfeiture of the policy or defeat its validity."

Palmer v. Continental Ins. Co., 132 Cal. 68.

Action upon policy of life insurance. The policy provided it should not be binding until countersigned by its general manager in Chicago. It was so countersigned and delivered to plaintiffs. It recited that it was executed in consideration of payment of $12 and the future payment of an instalment note for $48. The policy also provided that insurer should not be liable for any loss while the instalment was in default. The instalment due October 1 was unpaid and the fire occurred October 11. In holding for plaintiffs, the court said:

"If the defendant had given an indefinite credit to the plaintiffs,—that is, a credit generally,—without specifying the time at which the premium should be paid, its acknowledgment in the policy that it had been received would be conclusive against it in an action upon the policy. It is none the less conclusive because the time

> of credit is limited to sixty days, or for the reason that the agreement for credit is evidenced by a note. There is no statement in the policy that the twelve dollars was paid by a note, or that the plaintiffs had given their note therefor, and the conclusive effect created by the statute cannot be set aside by showing that a note was given. It was competent for the defendant to accept the note of the insured as payment of the premium, and it can no more dispute the binding effect of the policy by showing that the payment was made by a note which has not been paid, than it could if it had accepted their personal credit in lieu of money."

See also the same case,

Palmer v. Continental Ins. Co., 61 Pac. 784,

not reported in official reports.

Masson v. New England M. L. Ins. Co., 85 Cal. App. 633.

Action upon life insurance policy. At time of delivery Masson, the insured, was unable to pay the full first annual premium; he paid some cash and the balance in notes, and the policy and receipt were delivered. The notes were unpaid when Masson died. The court, in speaking of section 2598, Civil Code, said:

> "In giving application to said section it has been held in this state that where an authorized credit has been agreed upon as the equivalent or substitute for cash payment of the premium and the policy is delivered as a complete contract upon the consideration expressed therein, the re-

ceipt of which is 'impliedly acknowledged', the insurer is estopped to deny the validity of the policy, notwithstanding the declaration in it that it shall not be binding until the premium is actually paid (Farnum v. Phoenix Ins. Co., 83 Cal. 246 [17 Am. St. Rep. 233, 23 Pac. 869]); also that where a promissory note is taken as the equivalent of cash payment the recital of payment in the policy does not conclude the insurer in an action upon the note from showing that the premium has not been paid, but such recital, whether or not it is in the specific language of the code, is conclusive evidence of payment, 'so far as to make the policy binding', notwithstanding any stipulation therein to the effect that it shall be inoperative if the premium is not actually paid; that the recital has the same effect as a vendor's acknowledgment in a conveyance of land of the receipt of the purchase price. (Palmer v. Continental Ins. Co., 132 Cal. 68 [64 Pac. 97].)"

Courdway v. Peoples Mut. Life Ins. Co., 118 Cal. App. 530.

Action upon policy of accident and health insurance. At the time the policy was delivered to the agent for delivery to the insured, he paid the full net premium to the insurer. It was held, of course, that as between the insurer and insured the premium had been paid.

CONCLUSION AS TO FIRST QUESTION.

We may therefore conclude from the foregoing facts and argument:

First. That the application makes prepayment of the premium a condition precedent to the formation of a contract;

Second. Steinfeld, as agent, had no authority to waive this condition, and, in fact, did not waive it, because he continued to attempt to collect the premium;

Third. Nonperformance of this condition precedent and no effective waiver thereof prevented the formation of any contract;

Fourth. The motion for a directed verdict should have been granted.

SECOND QUESTION.

THERE WAS NO MEETING OF THE MINDS OF THE PARTIES; NOR WAS THERE IN FACT ANY DELIVERY OR ACCEPTANCE OF THE POLICIES.

Of course, one of the essentials to the formation of a contract is that the minds of the parties meet upon the exact terms; and one of the legal requirements to the taking effect of a contract in writing is delivery and acceptance. Section 1626, Civil Code, provides:

> "A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent."

Section 1627, Civil Code, provides:

> "The provisions of the chapter on transfers in general, concerning the delivery of grants, abso-

lute and conditional, apply to all written contracts."

Section 1054 (being the section referred to in section 1627) provides:

"A grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."

Manual delivery must be accompanied by an intent that it be effective.

9 *Cal. Juris.* 153.

The court will recall that Walter E. Frey made application for three policies, as follows:

$35,000.00 payable to San Francisco Milling Company;

$10,000.00 payable to Herbert E. Frey, his brother;

$10,000.00 payable to Selma Steventon, his sister.

Two only of the policies were issued, one for $10,000.00, payable to Herbert E. Frey, as beneficiary, and one for $10,000.00, payable to Selma Steventon, as beneficiary. These were delivered by Mr. Murray, the cashier, to Mr. Steinfeld. At the same time, however, there was delivered to him papers called "slips" in the testimony; one for each policy. A sample is contained in "Defendant's Exhibit J" (Tr. p. 76), and was in the following form:

"New Business. Stoppage Form.

This advice does not modify or change any existing rules.

To the Manager of the San Francisco Office:

From G. Trowbridge, Assistant Secretary and Registrar.

March 9, 1932.

The enclosed policy, No. ....., Insured's name Walter E. Frey, must not be delivered or the first premium accepted thereon until and unless the request written below has been executed by the insured. This form when properly executed as above is to be returned to the Registrar's Division at the Home Office, G. Trowbridge, Assistant Secretary and Registrar, The Mutual Life Insurance Company of New York."

It is signed Mutual Life Insurance Company of New York with a blank for the date. Then it says:

"Referring to the above-numbered policies the undersigned hereby accepts the said policies issued as follows:"

Mr. Murray testified that Mr. Steinfeld could not deliver the policies without having these "slips" signed by Walter E. Frey. He testified (Tr. p. 75):

"The agent has no authority to deliver a policy where there is a stoppage form like Exhibit J, which is given to him at the time the policies are given for delivery. The policy is given to the agent solely on condition that they will obtain the proper signatures that are required, and acceptance, before delivering the policies."

And, again (Tr. p. 78):

Not only did the application make prepayment of the premium a condition precedent, but apart from that, Mr. Steinfeld had no authority to deliver the

policies without payment of the premium. In this respect Mr. Murray testified (Tr. p. 75):

> "Mr. Steinfeld is a soliciting agent. He has no authority whatever to make any contracts or agreements on behalf of defendant. His duties are merely the soliciting of applications and the turning in of the applications to my office.
>
> The Court. Q. You say he has no authority to do what?
>
> A. He has not any authority to bind the company, or make supplemental contracts."

In referring to "Exhibit J", Mr. Murray continued his testimony (Tr. p. 76):

> "I might also say that the other condition of delivery of the policy is that he shall collect the premium while the applicant is in good health."

And, again referring to "Exhibit J", Mr. Murray testified (Tr. p. 77):

> "Mr. Boland. That is the form [Exhibit J] which I understand was to be executed.
>
> The Court. That must be executed upon delivery of the policies.
>
> Mr. Boland. Upon the delivery of the policies.
>
> Q. And also the premium paid while the applicant is in good health?
>
> A. Yes."

Mr. Steinfeld testified (Tr. p. 61):

> "I am an agent for defendant. I solicit applications. I have nothing whatever to do with the issuance of policies. If a policy is issued, I endeavor immediately to get the premium. It is a rule of the company that no policy shall be delivered without an inspection receipt, releasing the

company from any liability in the event of death, before the check or the money is paid. The inspection receipt has to be delivered or the money paid."

In this respect, also, therefore, there could be no meeting of the minds of the parties as to the delivery and acceptance of the policies without payment of the premium.

As appears from the statement of the case, there was clearly no meeting of the minds of the parties. It is true, the policies were taken out to the "Mill" and left with Herbert E. Frey and Selma Steventon, but they were subsequently returned and sent to the Home Office in New York, and canceled. Aside from any other reason for returning the policies and cancelling them, the following colloquy between the court and witness, Steinfeld, is sufficient (Tr. p. 103):

"The Court. Q. As a matter of fact, you stopped the payment on the check, so that the insurance company was without any money, wasn't it?

A. Yes.

Q. The premium had not been paid?

A. No.

Q. The policies were out for six or seven weeks?

A. Yes.

Q. Finally the company said to you, 'Get those policies'?

A. Yes."

And he did get the policies—they were canceled.

No request was ever made by Walter E. Frey, Herbert E. Frey or Selma Steventon for the return to them, or any of them, of the policies; but, on the contrary, new and different policies were requested, and Walter E. Frey, on June 1, underwent a second physical examination ("Defendant's Exhibit A", Tr. p. 55), and the new and different policies, as requested, were issued in New York and sent to the San Francisco agency. Then there was an attempt on the part of plaintiff and his associates to secure delivery of these second policies, even after the death of Walter E. Frey. Would he and his associates have done that if they had considered the earlier policies in force? Obviously not. Plaintiff and his associates knew they were not. They knew the policies had been surrendered to Mr. Steinfeld. They never asked or suggested their return. They were anxious to get the substitute policies. They never paid or attempted to pay the premium until after the death of Walter E. Frey. It seems too plain for argument that there was never any meeting of the minds of the parties as to the policies here in question.

The motion for directed verdict should have been granted.

THIRD QUESTION.

THE APPLICATION MAKES GOOD HEALTH OF WALTER E. FREY A CONDITION PRECEDENT. WALTER E. FREY WAS NOT IN GOOD HEALTH.

The application provides:

> "The proposed policy shall not take effect unless and until delivered to and received by the insured, the beneficiary or by the person who herein agrees to pay the premiums, during the insured's continuance in good health, and unless and until the first premium shall have been paid, during the insured's continuance in good health."

The application was made on March 4. It will be contended, I assume, that the policies in question were delivered (and became effective) on or about April 15. Walter E. Frey died on the night of June 3-4. Good health is a condition precedent. A discussion of the law upon this subject would be supererogatory. This honorable court has recently discussed and decided the question in favor of the appellant's position in the case of *New York Life Ins. Co. v. Gist,* 63 Fed. (2d) 732. The decisions in the other circuits upon this subject are unanimous. (See "first question".) The burden of proof to establish good health is upon the plaintiff. It was said in *Greenbaum v. Columbian Nat. Life Ins. Co.,* 62 Fed. (2d) 56:

> "Because a new trial will be required, it is well to express our views on the burden of proof on the issue of sound health. There is authority to the effect that such a clause as these policies contained regarding the effective date of the in-

surance makes the question of sound health only a matter of defense, but that view seems to give too little force to the fact that the parties expressly agreed that no insurance should take effect until the policies were delivered and the first premiums paid while the proposed insured was in sound health. Regardless of what may be necessary in any particular case to prove sound health as of the decisive time either prima facie or ultimately, we think it is a condition precedent with the burden on the plaintiff to prove it by a preponderance of all the evidence in order to show that the defendant ever became bound as an insurer."

Doctor Berger was called as a *fact* witness—not an expert witness—for defendant-appellant. Doctor Berger was for a number of years the autopsy surgeon to the Coroner of San Francisco. He had autopsied thousands of this type of case. (Tr. p. 45.) He performed two autopsies upon the body of Walter E. Frey, on June 4, the morning after his death. He stated (Tr. p. 44):

> "I determined to my satisfaction the cause of death, which I recorded as acute dilation of the heart, chronic myocarditis, and coronary sclerosis with occlusion, the latter being the immediate cause. I was unable to find any indication of any other pathology, that is, any other disease; no evidence of any injury. * * *. Subsequently I examined the same body and again carefully reviewed the condition of the heart, and I confirmed my former opinion as to the cause of death and so signed the death certificate."

He then testified (Tr. p. 46):

> "From my experience and the examination made, this disease existed on March 4, April 15 and June 1, and probably existed long prior to March 4. From my experience as a physician, and my examination of the body, Walter Frey was not in good health on April 15."

Doctor Allen, examining physician for defendant-appellant, stated (Tr. p. 53) that he had heard the testimony of Doctor Berger, and testified:

> "If the condition had been disclosed to me, whether on my examination or otherwise, Walter Frey would not have been accepted for insurance by the defendant. He would not have been considered an insurable risk. With ordinary sclerosis, as described by Doctor Berger, Walter Frey would not be in good health on April 15."

Doctor Moody was called (as an "expert") for the defendant. (Tr. p. 60.) He stated:

> "I heard the testimony of Doctor Berger and Doctor Allen, and I heard Doctor Berger's description of the condition of the body of Walter Frey as he discovered it upon autopsy. I should not consider a person in the condition which he described to be in good health on the preceding April 5."

The day after these doctors had testified, plaintiff and appellee called Doctor Bernard Kaufman. Doctor Kaufman did not hear the testimony of Doctor Berger. He had never seen Walter E. Frey and knew nothing of the case except as it was presented to him in conversation with appellee's attorney and

the questions which were asked him at the trial. Upon cross-examination he stated (Tr. p. 92):

> "I was first consulted with reference to my testimony in this case at nine o'clock last night [this was after the other doctors had testified], and charging a fee for my services as expert. I discussed the case with Mr. Eisner, of course, and the only thing I know about the case is from my conversation with Mr. Eisner last night, and the questions which he has put to me today. That is all I know about it."

With respect to his testimony, I shall show, I think, conclusively that there is no conflict between the testimony of Doctors Berger, Allen and Moody, on the one hand, and Doctor Kaufman, on the other hand. Doctor Berger did not come as a so-called "expert". He testified to facts within his own knowledge and observation. Doctor Kaufman came admittedly as an "expert", charging a fee for his services, with no knowledge other than such as he had acquired from plaintiff's counsel the night before and the hypothetical question presented to him. It is my opinion—and I think the observations of the judges which will be quoted hereinafter will substantiate that opinion—that the testimony of one so-called "expert" based upon an hypothetical question can rarely if ever prevail against testimony as to facts, observations and the conclusions drawn therefrom by a skilled person.

Again, however, assuming that I am wrong in this opinion (as I frequently am), then I believe I can easily demonstrate that there is no conflict in the testimony of Doctors Berger, Allen and Moody, on the one hand, and Doctor Kaufman, on the other.

I will treat the latter point first; that is, that there is no conflict in the testimony. I am placing in parallel columns the testimony of Doctor Berger as to his findings of fact, and opposed to that, the hypothetical question addressed to Doctor Kaufman:

Testimony of Doctor Berger (Tr. p. 44):

"I based that conclusion on the following factors in my examination: The finding of that defective pathology, that defective disease, which is not seen in normal health, and the elimination of any other disease or injuries of any kind. The heart, in itself, was acutely dilated. It was ballooned out in all of its chambers, the heart being a four-chambered organ, filled with blood. The heart, in itself, was about one and one-half times its normal size, with scattered areas throughout of musculatory or fibrous replacement. That is the result of injury to the heart muscles at some previous time. The coronary vessels—those are the vessels which cut off the large artery in the body that supplies the heart muscle with blood, itself, I found to be thickened and hardened. That is termed sclerosis of those vessels. On the left side the immediate branch of the left coronary vessel I found to be completely shut off. That is a condition that cannot exist

Testimony of Doctor Kaufman (Tr. p. 85):

"Q. If I told you, Doctor, that an autopsy surgeon found a heart acutely dilated in all chambers and filled with a dark fluid blood, the heart about one and one-half times its normal size, and there are scattered regions of fibrosis throughout; the coronary vessels of the left side indicate a marked thickening and in the descendens branch about one and one-half inches from its origin there is a complete occlusion by virtue of marked sclerosis of the vessel. There is no acute infarction seen. The coronary vessels of the right side, although thickened to a moderate degree, are in no way comparable to those of the left side. There is some sclerosis at the aortic cusps. The cusps are not flexible. Do these findings *necessarily* indicate that the person examined was not in good health prior to the time of death?"

OBSERVE THE USE OF THE WORD "NECESSARILY".

Testimony of Dr. Berger (Tr. p. 44) continued:

with life and not show any further damage to that particular portion of the heart. I saw no evidence by its closure that it had caused any acute or very immediate disease. I concluded that the individual had died so quickly that no acute disease as the result of this closure of that vessel could have formed. This I know, from my past experience in the examination of thousands of these types of heart, is a cause for immediate death. The occlusion is the cause for immediate death. *I found that the heart was a chronic heart; by that I mean there had been pre-existent disease as distinguished from acute.*"

It is obvious the hypothetical question is not complete and it was objected to on that ground. (Tr. p. 85.)

The answers are also in parallel columns:

Testimony of Doctor Berger (Tr. p. 46):

"From my experience and the examination made, this disease existed on March 4, April 15 and June 1, and probably existed long prior to March 4. From my experience as a physician, and my examination of the body, Walter Frey was not in good health on April 15."

Testimony of Doctor Kaufman (Tr. p. 86):

"A. No.

Q. They do not *necessarily* so indicate?

A. No."

Note the form of the question:

> "Do these findings *necessarily* indicate that the person examined was not in good health prior to the time of death?"

And the answer:

> "A. No.
> Q. They do not *necessarily* so indicate?
> A. No."

This is a "NEGATIVE PREGNANT." It denies nothing. Doctor Berger's testimony is to the point and positive. He says:

> "I found that the heart was a chronic heart; by that I mean there had been pre-existent disease as distinguished from acute."

And his statement is equally positive that Walter E. Frey was not in good health, and he says:

> "From my experience and the examination made, this disease existed on March 4, April 15 and June 1, *and probably existed long prior to March 4.*"

Merely stating that the conditions found do not *"necessarily"* indicate lack of good health, *admits* that they *may* indicate lack of good health. In fact, in a pleading it would be an admission that there was lack of good health. Certainly, it cannot raise an issue against the positive testimony of Doctor Berger, *and the established fact that the man died of the exact disease.* This, of course, is uncontradicted. If Walter E. Frey were still alive, and the "experts" were disputing as to the effect certain symptoms dis-

closed, then such testimony might be of some value as throwing some doubt upon some other witnesses' testimony; *but here we are confronted with the actual fact that he actually died of the particular disease.*

Doctor Kaufman was equally evasive in another respect. Doctor Berger testified that Frey's heart was enlarged about one and one-half times normal size. (Tr. p. 45.) He said (Tr. p. 47):

> "I can tell very closely by the size of the heart, as I find it relaxed after death, what the size of the heart, as I find it relaxed after death, what the size of that heart was in normal life. I would not have to weigh it. I think I can accurately determine that fact."

He further said:

> "A heart that is acutely dilated, as this heart was, and which you have properly stated is not a dilation but a relaxation, when opened and allowed to empty itself of the contents of its chambers and then brought back to its position as it should normally be, is a very close consideration of what it was in life. Of course, if it is allowed to stand or lay ballooned with its clotted blood, we cannot very well tell. *That is a routine part of the examination, to cut the heart in such a way that the entire inside of the heart is exposed, and that the entire free blood which is not part of some disease is eliminated from it. I certainly did that in this instance. I was able to ascertain whether or not this heart was in lifetime an enlarged heart. I said it was about one and one-half times the normal heart."*

Dr. Kaufman testified (Tr. p. 89):

> "To the question whether it is possible for an autopsy surgeon simply to squeeze the heart together, or to squeeze the blood that is in the heart out of it, and to determine from that that the man had a heart enlarged during his lifetime, *my answer is I know of no authorities that will allow that method of determining the size of a heart.*"

Doctor Berger had, as he testified, "autopsied" hundreds and hundreds of those types of cases. (Tr. p. 52.)

It is no denial of Dr. Berger's positive testimony, based upon observation, knowledge and experience, for Doctor Kaufman to say that he knows "no authorities that will allow that method of determining the size of a heart." There may not be any, and if there were, he might not have read them.

There is another matter which will probably be urged in this connection. Walter E. Frey was examined about March 5, by Doctor Allen, and again on June 1, and at neither time did he discover the heart condition. In this connection Doctor Allen testified (Tr. p. 53):

> "I heard the testimony of Doctor Berger. In most instances the condition of the body of Walter Frey, which he described, *would not be ascertainable by me on the usual life insurance medical examination.* There are special methods, special examinations of discovering that. These are not ordinarily used in the medical examination for life insurance."

Doctor Moody testified in the same connection (Tr. p. 61):

"In a way I am familiar with the ordinary type of insurance medical examination. I have never made any insurance examination, however. With my knowledge of that custom and practice, and the condition of this body, as it has been described, I think that condition could be overlooked by an insurance medical examiner. As a matter of fact, I have seen similar conditions many times that have been overlooked by competent medical men."

Doctor Berger testified in this connection (Tr. p. 45):

"Mr. Boland. Can you tell us, Doctor, from your experience and your examination of the body, whether this disease could be detected by the ordinary medical examination which would ordinarily be made for insurance companies, or just an ordinary medical examination in your office?

A. In many, many instances that type of heart is entirely missed.

Q. How can it be discovered?

A. There are certain procedures, very technical, that we may go through with. To determine its size, you may find that by X-ray. To determine this particular type of disease might be determined by other technical examinations—electrocardiogram, and various other pulse registrations which are highly technical and do not come into the ordinary course of an examination. I am familiar with the usual type of insurance medical examination. This disease could be very easily *not* detected by that type of examination."

Doctor Kaufman again ventured a qualified denial. He said (Tr. p. 89):

> "It is *reasonable* to expect that if a patient has a materially enlarged heart, for example, one and one-half times normal size, that such a fact would be found by a physical examination, *except there be a deformity of the chest wall of such a character that would make a physical examination not an average examination.*"

Observe it is only "reasonable"; not even "necessarily".

However, at least one court has completely answered the proposition in a very similar case.

> *Scharlach v. Pacific Mut. Life,* 16 Fed. (2) 245.
>
> "To say the least, it is questionable whether there was the slightest inconsistency between the evidence to the effect that the deceased was not in good health when the policies were delivered and the evidence relied on by the plaintiff in error. Dr. Judd's statement that there was no way of telling how long the deceased had been suffering from cancer was consistent with the truth of the testimony to the effect that the ulcer disclosed by the operation proved that the cancer had been in existence since prior to May 12, 1923. A cancer disclosed by an operation may not be evidence sufficient to support a finding as to how long it had existed, and at the same time be conclusive proof that it had been in existence several months. There was no material conflict between the other testimony relied on by the plaintiff in error and that to the effect that deceased was not in good health on May 12th, when the policies were delivered. The testimony of the physicians who

treated the deceased or examined his blood prior to that date indicated that the deceased then had no serious ailment, which was disclosed by his outward appearance or was discoverable without a physical examination of him which included a count or testing of his blood.

Where the disease is one the existence of which at a given stage of it is not discoverable, even by a skilled physician, except by ascertaining existing symptoms and making an examination of the blood of the person in question, a finding by a physician, based on such an examination, that that person has such disease, cannot well be said to be put in issue or impeached by a finding of the absence of disease by another physician, who made no such examination, and from whom the symptoms suggesting such examination were concealed, or by testimony, based only on observation of such person's outward appearance, that he then seemed to be in good health. Obviously such evidence lacks probative value, where the question is whether a person has or is free from a disease or ailment which is not discoverable by merely observing the outward appearance of that person. Metropolitan Life Ins. Co. v. Betz, 44 Tex. Civ. App. 557, 99 S. W. 1140.

The setting up of the testimony relied on by the plaintiff in error against the otherwise uncontroverted testimony to the effect that the deceased was not in good health when the policies were delivered may be compared with an attempt to contradict testimony as to the color of a thing given by a witness who is capable of distinguishing colors by testimony on that subject by a witness who is color blind and cannot tell one color from another. But, assuming that the evidence

relied on by the plaintiff in error, if standing by itself, was sufficient to support a finding that the deceased was in good health when the policies were delivered, it was not such evidence as reasonably could be given the effect of rebutting or contradicting the evidence which showed that the deceased then had a serious internal disease, the existence of which was not disclosed by his outward appearance."

I shall now refer to my opinion that the testimony of one so-called "expert", based on a hypothetical question, can rarely if ever prevail against testimony as to facts, observations and the conclusions drawn therefrom by a skilled person. The privilege of calling expert witnesses is one subject of much abuse. It frequently serves a useful purpose, but such testimony should be treated with caution, as was said by the Supreme Court of California, in *Grigsby v. Clear Lake Water Co.,* 40 Cal. 396, and also 22 *Corpus Juris,* p. 735, "Evidence", Sec. 825.

Grigsby v. Clear Lake Water Co., 40 Cal. 396.

"Ordinarily, it is true, witnesses testify only as to facts, leaving it to the jury to draw their conclusions, but upon matters of science and questions requiring peculiar skill an exception is made. These witnesses ought, perhaps, to be selected by the Court, and should be impartial as well as learned and skillful. A contrary practice, however, is now probably too well established to allow the more salutary rule to be enforced, but it must be painfully evident to every practitioner that these witnesses are generally but adroit advocates

of the theory upon which the party calling them relies, rather than impartial experts, upon whose superior judgment and learning the jury can safely rely. Even men of the highest character and integrity are apt to be prejudiced in favor of the party by whom they are employed. And, as a matter of course, no expert is called until the party calling him is assured that his opinion will be favorable."

22 *Corpus Juris*, p. 735, "Evidence", Sec. 825.

"The general uncertainty and persistent disagreement of authority on many lines of professional and scientific inquiry, the fact that this class of evidence deals so largely with the problematical and the conjectural, and the consideration that there are other elements of unreliability arising from human frailty, bias, loyalty to one's employer, pride of opinion, self-interest, or the heat engendered by controversy, which more or less unconsciously warp the mind of the witness, even without the more vulgar elements of venality and the absence of any efficient punishment for perjury, have caused courts of the highest eminence to feel that experts are frequently rather the hired advocates of the parties than men of science placing their special experience at the service of the cause of justice. These considerations have caused the courts to characterize this class of evidence unfavorably as rather unreliable, not of great probative force, weakest and most unreliable, the weakest character of testimony, the lowest order of evidence, the lowest grade of evidence that ever comes into a court of justice, the most unsatisfactory character of evidence, wholly worthless for any judicial purpose, and of less

> than no value; to rule that such evidence should be received with caution, with narrow scrutiny and with much caution, and even that it should never be received at all except when absolutely necessary; and to consider that the statement of an inference or judgment is inferior in probative effect to a statement of fact."

However, Doctor Kaufman was, as we have seen, sufficiently cautious as to probably avoid the aspersions usually cast upon such testimony; but also probably to render his testimony useless and abortive.

But we have here a case: Doctor Bergér, an unbiased witness (not called merely as a paid "expert") who performed not only one autopsy but two autopsies upon the body of Walter E. Frey, simply as a matter of duty as autopsy surgeon to the Coroner. His testimony is based upon facts and observations, and his deductions therefrom as an experienced autopsy surgeon. On the other hand, we have Doctor Kaufman, a paid "expert" rushed into the case after an evening conference with appellee's counsel; knowing nothing of the subject of controversy except as he may have acquired such knowledge during this conference. I have gone to some pains to find a series of quotations from cases involving just such a situation. It will be useless for appellee to point out that in each of these cases the remarks quoted were used in regard to a disputed question of fact resulting in the verdict of the jury. I know that already, and I frankly so tell the court. The merit in these quotations is not as *stare decisis,* but merely as being observations of judges of experience and learned in the law.

Morewood v. Enequist, 64 U. S. 49, 16 L. ed. 516.

"Where witnesses of proper skill and experience have formed their judgment from a personal examination of the subject of the controversy, their opinions are generally more worthy of confidence than those elicited by hypothetical questions, which may or may not state all the accidents and circumstances necessary to form a correct conclusion."

McCardle v. Indianapolis Water Co., 272 U. S. 400, 71 L. ed. 316.

"The testimony of competent valuation engineers who examined the property and made estimates in respect of its condition is to be preferred to mere calculations based on averages and assumed probabilities."

In re Ward, 194 Fed. 89, 91.

"Moreover, the clear weight of the alienists' and physicians' testimony is to the same effect. Of the alienists called by the respondent, two of them, as well as both the general medical practitioners, had Ward under treatment, and their testimony has therefore correspondingly greater weight than the hypothetical testimony produced by the petitioners."

Cornee v. Baltimore & O. R. Co., 48 Fed. (2d) 497.

"Eyewitnesses, whom the judge found to be truthful, so testified; and the only substantial evidence to the contrary is the opinion of one of the experts. Direct evidence of an occurrence is, of course, entitled to greater weight than

opinion evidence [Lancashire Shipping Co. v. Morse Dry Dock & Repair Co. (D. C.), 43 F. (2d) 750]; and we should hesitate to base a finding upon the opinion evidence here, which is opposed to the overwhelming weight of the testimony of eyewitnesses."

Finke v. Hess, 174 N. W. 466 (Wis.).

"True, after the operation it appears one side of plaintiff's face was paralyzed, but in order to warrant the court in submitting the case to the jury there must be some evidence that the defendant severed the facial nerves; and we find none in the record. There is positive evidence, not only by defendant, but by Dr. Beck, a Chicago specialist, that the nerve was not severed. Dr. Beck opened up the old scar in an effort to relieve pressure on the nerve, and testified that the nerve had not been severed. * * *

Some reliance is placed on the opinion of Dr. Boyce. But his opinion could not raise a conflict with the positive undisputed evidence that the nerve was not severed, and that other causes existed for the paralysis. Baxter v. Chicago & N. W. Ry. Co., 104 Wis. 307, 80 N. W. 644; 2 Moore on Facts, Sec. 1236."

DeDonato v. Wells, 41 S. W. (2d) 184 (Mo.), 82 A. L. R. 1331.

"It is proper for a medical expert to testify and give his opinion either from facts within his own knowledge and observation, or from hypothetical facts, or from the two combined. * * * It would also seem obvious that, where the witness' opinion is based on and supported by his personal observation and knowledge, it is more

likely to be correct than when the facts are merely hypothetical. In the former case, not only are his superior knowledge, training, and experience exercised to form correct conclusions on the facts, but also in discovering and correlating material and relevant facts."

In re De Lin's Estate, 294 Pac. (Ore.) 600.

"We cannot give to expert testimony based on hypothetical questions the same weight we do the direct and positive testimony of the doctor who treated testate. The latter has a great advantage over the former. Dr. Smith, who did see her, examined her, conversed with her, is very positive in his testimony that the testate was mentally competent. He had every opportunity of observing the testate, and would have discovered her mental incapacity if she had been mentally unsound."

Bishop v. Scharf, 241 N. W. (Iowa) 3, 8.

"The opportunity of Dr. Dean, Dr. Koch, and the nurse to observe the testatrix and to know at first hand the facts from day to day, gives to their testimony significance and weight that cannot be given to conclusions based upon mere hypothetical facts."

Colburn v. Kenyon Steel Pump Co., 214 N. W. (Minn.) 29, 30.

"It is a general rule of evidence that, where witnesses of proper skill and experience have formed their judgment from a personal examination of the subject of the controversy, their opinions are generally more worthy of confidence than those elicited by hypothetical questions which may or may not state all circumstances

necessary to form a correct conclusion. Morewood et al. v. Enequist, 23 How. 491, 16 L. ed. 516; 11 R. C. L. 578."

Linn v. Terrell Compress & Warehouse Co., 142 So. 193 (La.).

"It is the contention of plaintiff that Linn's death was due to overexertion, causing an acute dilation of the heart and an aggravation of the condition of chronic myocarditis, with which a post mortem examination disclosed Linn to be afflicted. In support of the position of plaintiff, Dr. George Roeling, the coroner for the parish of Orleans, testified that Linn's death was due to chronic myocarditis and acute dilation. Dr. George Dempsey, who had been the physician of Mr. Linn for a number of years, testified that acute dilation is due to shock and unusual exertion, because 'a man could have chronic myocarditis and live for years if he did not overexert himself.' * * *

It thus appears that the testimony of Dr. Duval is not inconsistent with the findings of the coroner who performed the autopsy on Mr. Linn, and, in the respect that his findings and conclusions may differ from those of Dr. Dempsey, we believe they should prevail, because, from the record before us, Dr. Duval appears to have had great experience, having performed some ten thousand autopsies, and he is a specialist in pathology, whereas Dr. Dempsey is, we understand, a general practitioner."

Vincennes Water Supply Co. v. Public Service Commission, 34 Fed. (2d) 5.

"On the other hand, neither Carter nor Wenger ever saw any of the mains or any of the

meters, except some in the office building, which were not examined. They did not examine the inside of any of the equipment, or any of the mains in use, or any of the surface pipes. Mr. Wenger testified that he was not interested in opening any of the pipes and taking out sections. 'Opinion evidence, to be of any value, should be based either upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based upon disclosed facts is of little or no value.' Balaban & Katz Corp. v. Commissioner of Internal Revenue (C. C. A.), 30 D. (2d) 807."

The result of all this discussion is that the evidence is affirmative and positive that Walter E. Frey was not in good health, and that because good health is a condition precedent to the formation of a contract, the motion for a directed verdict should have been granted; that the testimony of Doctor Kaufman raises no substantial issue of fact. His testimony was so qualified (for which we give him praise) as to be of no value to plaintiff-appellee, and to have raised no conflict. His testimony does not amount to even "a scintilla". Under such circumstances a motion for a directed verdict must be granted.

Gunning v. Cooley, 281 U. S. 90, 74 L. ed. 720.

The rule with respect to directed verdicts is stated as follows:

" 'When, on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the

plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party.' Slocum v. New York L. Ins. Co., 228 U. S. 364, 369, 57 L. ed. 879, 882, 33 Sup. Ct. Rep. 523, Ann. Cas. 1914D, 1029.

A mere scintilla of evidence is not enough to require the submission of an issue to the jury. The decisions establish a more reasonable rule 'that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.' Schuylkill & D. Improv. & R. Co. v. Munson, 14 Wall. 442, 448, 20 L. ed. 867, 872; Pleasants v. Fant, 22 Wall. 116, 122, 22 L. ed. 780, 783."

CONCLUSION.

It is respectfully submitted that each of the questions should be answered in the affirmative; that is, in favor of the appellant; and that the judgment should be reversed and the court directed to enter a verdict for the defendant-appellant.

Dated, San Francisco,
February 14, 1934.

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